United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2382

To be argued by
STANLEY B. GRUBER

In The

United States Court of Appeals

For The Second Circuit

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellants-Appellees,

vs.

MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE, ABRAHAM E. FREEDMAN

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UNITED STATES COURT OF APPEALS

for the Second Circuit

Docket No. 74-2382

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellants-Appellees,

- against -

MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Statement of Issues Presented For Review

1. Where a trustee incurs counsel fees (a) in the successful defense of trust assets, (b) in the successful defense of certain claims to surcharge him, and (c) in the unsuccessful defense of a separate claim to surcharge him, was it not proper to allocate these counsel fees between the trust fund and the trustee personally by

charging the trustee personally only for that portion attributable to his unsuccessful defense of the matter on which he was surcharged?

2. Was not the finding of the Court below that "Mr. Freedman has paid his own legal expenses arising out of this litigation" supported by the evidence and, therefore, not "clearly erroneous?"

Preliminary Statement

This brief is submitted on behalf of defendant-appellee Abraham E. Freedman in response to that portion of the plaintiffs' appeal which relates to the Order of the Court below (Bonsal, Jr.) refusing to surcharge defendant Freedman for additional counsel fees over and above the counsel fees in the amount of $54,325.18 which he already has personally paid. The decision of the Court below is not yet officially reported but appears in Appendix II at page 147a.*

In the Court below plaintiffs moved to enter judgment against defendant Freedman in a "sum equal to the total payments made ... in his defense" as a trustee of that Plan. The Court below held that " ... Mr. Freedman has paid his own legal expenses arising out of this litigation. Therefore, with respect to Mr. Freedman,

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* "Appendix II" refers to the Joint Appendix filed in this appeal. "Appendix I" refers to the Joint Appendix filed in the previous appeal to this Court in this litigation, Nos. 689, 1089-91, Docket 72-2443, 73-1082, 73-1363 and 73-1383.

there is no basis for any Order directing him to reimburse the Plan for legal fees and disbursements attributable to his defense" (Appendix II, pages 152a -153a). As will be more fully set forth in this brief, the fees attributable to counsel representing defendant Freedman in prior district court proceedings were allocated between the NMU Officers Pension Plan trust fund and defendant Freedman personally on the basis that those fees incurred in successfully defending trust assets and in successfully defending efforts to surcharge defendant Freedman were allocated to the trust fund, and the fees incurred in defense of the matter on which defendant Freedman was surcharged were charged to him personally. Such an allocation was in accord with well established legal principles, and the decision of the trial judge, who had direct knowledge of the issues involved and the activities of counsel from the inception of the litigation, and thus was uniquely situated to appraise the propriety of the allocation, is amply supported by the evidence and certainly not "clearly erroneous."

STATEMENT OF THE CASE

Although lengthy, and burdened with much material that is irrelevant to the issues involved on this appeal, the plaintiffs' statement of the case is nonetheless

incomplete and, in several instances, inaccurate and misleading. It is thus necessary to restate the history of the case, at least insofar as it relates to the appeal involving defendant Freedman.

This litigation can best be understood if broken down into three separate and distinct phases: Phase I can be referred to as the initial liability phase, Phase II as the accounting and surcharge phase, and Phase III as the counsel fee dispute phase. We are currently in Phase III which relates to the disputes over the payment of counsel fees incurred in Phases I and II. Phases I and II are over, having been the subjects of previous appeals to this Court and petitions for writs of certiorari to the Supreme Court.*

Insofar as appellee Freedman is concerned, the current appeal relates to counsel fees which were incurred only in Phase II. Mr. Freedman was represented by his own law firm

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* The Phase I decisions are reported in Morrissey v. Curran, 302 F. Supp 32 (S.D.N.Y. 1969), aff'd in part, rev'd in part, 423 F. 2d (2nd Cir.), cert. denied, 399 U.S. 928 (1970), Segal v. Morrissey, 400 U.S. 826 (1970).

The Phase II decisions are reported in Morrissey v. Curran, 336 F. Supp. 1107 (S.D.N.Y. 1972), and 351 F. Supp. 775 (S.D.N.Y. 1972), both affirmed, 493 F. 2d 480 (2nd Cir. 1973), cert. denied, 414 U.S. 1128 (1974), Perry v. Morrissey, 414 U.S. 1128 (1974), Freedman v. Morrissey, 414 U.S. 1128 (1974).

The most recent Phase III decision dealing with plaintiffs' application for counsel fees is reported in Morrissey v. Curran, 386 F. Supp. 167 (S.D.N.Y. 1974). This decision was not been appealed.

in the Phase I and Phase III proceedings, as well as in connection with the filing of his petition for a writ of certiorari in Phase II. No charges have been made or bills submitted for the latter services either to the trust fund or to the National Maritime Union of America.

During the trial court proceedings in Phase II, defendant Freedman was represented by the firm of Bloom and Epstein. On his appeal to this Court in the Phase II proceedings he was represented by the firm of Paul, Weiss, Rifkind, Wharton and Garrison. The fees of Messrs. Paul, Weiss, Rifkind, Wharton and Garrison for representing Mr. Freedman on appeal were paid in their entirety by Mr. Freedman personally (2b)* and are not involved in this appeal. Thus, the issue on this appeal as against defendant Freedman primarily relates to the propriety of the allocation to the trust fund of a portion of the fees of Messrs. Bloom and Epstein for the services which they rendered in the Phase II trial court proceedings. To understand this allocation, it is necessary to briefly review the history of this litigation.

This action was instituted by three members of the National Maritime Union (NMU) challenging the inclusion within the coverage of the NMU Officers Pension Plan of certain employees of the Union. It was the plaintiffs' contention that the NMU Constitution authorized only the

* "b" references are to the Appendix annexed to this brief.

coverage of "officers" under this Pension Plan, and that the coverage of employees who were not "officers" was not permitted. The district court (Bonsal, J.) agreed with plaintiffs' interpretation of the NMU Constitution and directed an accounting and the return to the Union of all monies contributed by the NMU to the Pension Plan to provide pensions for non-officers. See Morrissey v. Curran, 302 F. Supp. 32 (S.D.N.Y. 1969). This decision was affirmed by district court on appeal and a petition for a writ of certiorari was denied, Morrissey v. Curran, 423 F. Supp. 393 (2nd Cir.), cert. denied, 399 U.S. 928 (1970), 400 U.S. 826 (1970). The denial of the petition for a writ of certiroari marked the end of Phase I of this litigation.

On remand to the district court an accounting was submitted by the defendants. Counsel for plaintiffs contested this accounting and it was at this point that defendant Freedman, after lengthy discussion with the Court, decided to retain separate counsel (Appendix I, page 1045a). The counsel retained were Messrs. Bloom and Epstein. Lengthy and expensive discovery proceedings were instituted by the plaintiffs which included depositions and exhaustive interrogatories. In the course of these discovery proceedings, counsel for plaintiffs raised, for the first time, the contention that officers who were appointed in accordance with the NMU Constitution were not entitled

to be covered under the Officers Pension Plan because they had not been "elected." This contention was opposed by Messrs. Bloom and Epstein who, in fact, were the only counsel to do so (2b - 3b, 5b - 6b). As a result of the lengthy discovery proceedings with respect to the accounting, the parties were able to stipulate as to the amount of money which had been contributed to the Officers Pension Plan to provide pensions for employees of the Union as well as those officers who had been appointed rather than elected. That stipulation, as set forth in the district court's opinion, was as follows:

	Contributions
Patrolmen	$1,021,930.40
Field Patrolmen	55,692.06
Agents	31,015.16
Organizers	81,102.70
William Perry	84,792.58
Staff Employees	354,398.10
Total	$1,628,921.00

Patrolmen, Field Patrolmen and Agents were officer positions. There was no dispute that Organizers, William Perry and Staff Employees fell into the employee category. See Morrissey v. Curran, 336 F. Supp. 1107, 1109 (S.D.N.Y. 1972).

Plaintiffs contended that the total amount of the foregoing contributions, $1,628.921.00, plus interest, had to be refunded from the assets of the pension trust, and that the beneficiaries of the pension trust for whom

these contributions had been made should be denied pension coverage. Messrs. Bloom and Epstein contested the claim that the amounts contributed for appointed Agents, Field Patrolmen and Patrolmen had been improperly contributed to the Plan and that these individuals should be denied pension coverage. The total amount involved with respect to the dispute over the coverage of Agents, Field Patrolmen and Patrolmen was $1,108,337.62, on which there would have been interest of approximately $250,000.00 if plaintiffs prevailed on their contention. This issue went to trial before Judge Bonsal and Judge Bonsal rejected plaintiffs' contention in a decision which this Court subsequently affirmed on appeal, see Morrissey v. Curran, 336 F. Supp. 1107 (S.D.N.Y. 1972), affirmed, 483 F. 2d 480 (2nd Cir. 1973), cert. denied, 414 U.S. 1128 (1974). Thus, as a result of the efforts of Messrs. Bloom and Epstein, there was a saving to the Pension Plan, and a consequent protection of the rights of beneficiaries, in an amount in excess of $1,350,000.00. Messrs. Bloom and Epstein submitted a bill for their services in this accounting phase of the litigation in the amount of $51,803.37 (Appendix II, page 62a). This bill was paid by the trust as it was the beneficiary - and obviously a very substantial beneficiary - of their services. In this regard, it should be noted that the services rendered by Messrs. Bloom and Epstein in the accounting phase

were not and could not have been for the benefit of Mr. Freedman individually as he could not possibly have been surcharged for the payments made by the NMU to the Pension Plan, particularly in view of the fact that plaintiffs' counsel stipulated on the record at the trial on the accounting that the payments made by the Union to the Pension Plan had been properly authorized in accordance with the NMU's Constitution (Appendix I, page 251a).*

At the trial on the accounting it also was stipulated that the following amounts had been paid as pensions to former employees of the Union who fell into the category of employees and therefore were not entitled to coverage under the Pension Plan under the Court's Phase I decision:

William Perry	$222,200.00
Sarah Laderhandler	9,201.00
James Tevan	12,799.00
Sophia Tevan	11,561.00
Irving Brauch	115,510.00
Total	$371,271.00

See Morrissey v. Curran, 336 F. Supp. 1107, 1110 (S.D.N.Y. 1972).

As part of the judgment entered by the Court following the trial on the accounting, judgment was entered against one of the foregoing employees, William Perry, who was directed to repay to the Pension Plan the sum of $222,200.00, which had been paid to him as a pension, plus interest. No

* It should also be noted that the Bloom and Epstein bill was submitted and paid prior to the intitation of the subsequent surcharge proceedings.

judgment was entered against the other recipients of Pension benefits.

Following the Court's decision on the accounting, counsel for plaintiffs moved the Court to surcharge the defendants for the amounts which had been paid to Perry and to the other employee pensioners. There was a trial on this surcharge proceeding which was held in two stages: the first stage, in which plaintiffs presented their case for surcharging all the defendants, was held over three trial days, April 13 and 14, and May 1, 1972. At the conclusion of the plaintiffs' case, the defendants moved to dismiss and the trial was adjourned for the submission of briefs on this motion. On June 29, 1972, Judge Bonsal filed a memorandum opinion, which is not officially reported but is printed at pages 1209c through 1209u of Appendix I, in which he granted the defendants' motion to dismiss insofar as plaintiffs sought to surcharge defendants for the payments to Irving Brauch, James Tevan, Sophia Tevan and Sarah Laderhandler, but denied the motion to dismiss as to the payment to William Perry.

A further hearing was then held on July 12, 1972 at which the defendants presented their defense to the contention that they be surcharged for the payment to defendant Perry. On October 26, 1972 Judge Bonsal filed a decision in which he held that defendant Freedman should be surcharged for the payment to Perry, but exonerated

the remaining trustees, Morrissey v. Curran, 351 F. Supp. 775 (S.D.N.Y. 1972).

During the trial on the surcharge proceedings, defendant Freedman continued to be represented by Messrs. Bloom and Epstein. Messrs. Bloom and Epstein submitted a bill to him for the services which they rendered during the surcharge stage of the proceedings in the amount of $56,709.56 (Appendix II, page 168a). Since a portion of these services was rendered in relation to their successful defense of plaintiffs' effort to surcharge defendant Freedman for the payments to Irving Brauch, James Tevan, Sophia Tevan and Sarah Laderhandler, the issue arose as to how much of this bill should be allocated to these services and properly charged to the Pension Plan. The trustees of the Pension Plan, Messrs. Karchmer, Segal and Freedman, determined that the most prudent course would be to obtain the opinion of respected, independent counsel, who had no prior connection with the NMU, the Officers Pension Plan or any of the individual defendants, for guidance.

The law firm of Willkie, Farr and Gallagher was thereupon retained and a member of that firm, Thomas Monfried, Esq., who is expert in pension and trust matters, reviewed all the prior proceedings and decisions, consulted directly with the counsel involved and rendered his opinion that 40% of the Bloom and

Epstein bill was attributable to the Perry matter and could not be paid by the trust, and that the remaining 60% was not attributable to the Perry matter and could properly be paid by the trust fund (Appendix II, pages 178a - 180a). This advice was accepted by the trustees and the trust fund paid 60% of the Bloom and Epstein bill, and defendant Freedman personally paid 40% of the bill. In this regard, the statement at Page 12 of plaintiffs' brief that the trust fund paid all the Bloom and Epstein bill is incorrect.

As previously noted, the judgment entered by Judge Bonsal on February 18, 1974, following the accounting trial, included a judgment in favor of the Pension Plan against defendant Perry directing him to repay the $222,200.00 which he had received, plus interest (Appendix I, page 1232a). This judgment was entered prior to the initiation of the surcharge proceedings and long prior to Judge Bonsal's decision of October 20, 1972 surcharging defendant Freedman for the payment to Perry.

After the entry of judgment against Perry, the trustees instituted efforts to seek to collect the judgment. The handling of this supplementary proceeding was initially assigned to Herbert Zelenko, and subsequently

the firm of Botein, Hays, Sklar and Herzberg was retained to pursue the Perry judgment. This was done before the decision surcharging defendant Freedman was rendered, and the statement in plaintiffs' brief at pages 18 and 19 that Messrs. Botein, Hays, Sklar and Herzberg were retained to pull Mr. Freedman's "chestnuts from the fire" is a gross misstatement because, at the time they were retained, Mr. Freedman had not been surcharged, and thus had no "chestnuts in the fire." Moreover, until such time as the judgment against Freedman was paid, the trustees were under an obligation to pursue the Perry judgment (Appendix II, 71a, 91a). Upon the payment of the judgment by defendant Freedman, the services of the Botein firm were discontinued.

ARGUMENT

I The District Court's Decision Sustaining The Allocation Of Counsel Fees Is Amply Supported By The Evidence And By Judicial Authority

The district court held that since Mr. Freedman had paid his own legal expenses arising out of this litigation "there is no basis for any Order directing him to reimburse the Plan for legal fees and disbursements attributable to his defense" (Appendix II pages 152a - 153a). In so doing the district court was following the procedure which was adopted with respect to the counsel fees incurred by Messrs. Segal and Karchmer in allocating to the trust fund those fees which were incurred in protecting trust assets and successfully defending surcharge claims, and allocating to the trustees personally those fees relating to the defense of the Perry surcharge.

The procedure adopted by the Court below was in accordance with the well settled principle that trustees are entitled to reimbursement for attorneys' fees incurred in protecting trust assets or in successful defense against claims of trustee misconduct, In re Hildreth's Will, 274 App. Div. 611, 615-616, 85 N.Y.S. 2d 829, (2nd Dept. 1949), affirmed 301 N.Y. 705 (1950); In re Smather's Will, 212 N.Y.S. 2d 152, 155 (1961). The application of this principle to Section 501 of the Labor-Management Reporting

and Disclosure Act, 29 U.S.C. § 501, was confirmed by this Court in Holdeman v. Sheldon, 311 F. 2d 2 (2nd Cir. 1962), where the Court held that a union official who has successfully defended an action against him under Section 501 is entitled to reimbursement for the counsel fees incurred in his defense. See also Koonce v. Gaier, 320 F. Supp. 1323-24 (S.D.N.Y. 1971) and Kerr v. Shanks, 466 F. 2d 1271 (9th Cir. 1972).

There is no dispute that defendant Freedman is obligated to pay counsel fees incurred in defending against the Perry surcharge. Mr. Freedman has never claimed otherwise and, indeed, has paid the counsel fees incurred in this defense in the amount of $54,326.18.

In dispute here are the counsel fees arising out of the actions of Mr. Freedman's counsel in successfully opposing plaintiffs' contention that non-elected officers could not be covered by the Officers Pension Plan and in successfully defending Mr. Freedman with regard to the surcharge claims which did not relate to Mr. Perry. Judge Bonsal found that those fees were properly allocable to the trust fund.

The fees paid to the firm of Botein, Hays, Sklar and Herzberg also were proper expenses of the trust. Once a judgment had been rendered in favor of the trustees against Mr. Perry, the trustees were obligated to take

all reasonable steps in attempting to collect on that judgment. The judgment against Mr. Perry predated the judgment against Mr. Freedman by some eight months and the decision of this Court affirming the judgment against Mr. Freedman came over one year and four months after the Perry judgment was entered. The Supreme Court's denial of Mr. Freedman's petition for a writ of certiorari came on January 7, 1974, almost two years after the Perry judgment was entered. If the trustees had sat on their hands for almost two years without attempting to enforce the Perry judgment, it is certain that plaintiffs' counsel would be in court attempting to surcharge them for this lack of prudence. Mr. Freedman paid the judgment following the denial of his petition for writ of certiorari. Following that payment by Mr. Freedman no further counsel fees were incurred by the trustees in attempting to collect the Perry judgment.

The allocation of counsel fees is a matter within the sound judicial discretion of the trial court which in this case was fully aware of the activities and conduct of counsel and the value of the services rendered. It is the type of determination which should not be overturned unless "clearly erroneous." Rule 52 F.R.C.P. See In re

32-36 North State Street Building Corp, 164 F. 2d 205, 206 (7th Cir. 1947); Simlar v. Conner, 352 F. 2d 138 (10th Cir. 1965). The decision of the Court below sustaining the allocation of Mr. Freedman's counsel fees is amply supported by substantial evidence and presents no basis under which this Court could conclude that the trial court's decision was "clearly erroneous."*

* Plaintiffs contend that Judge Bonsal's Order of July 6, 1970 was violated by the payment of counsel fees to Mr. Freedman's counsel by the Officers Pension Fund and by the fact that certain of Mr. Freedman's partners represented Mr. Freedman in connection with the preparation of a petition for a writ of certiorari and at the proceedings below which are the subject of this appeal. Judge Bonsal, who issued the July 6, 1970 Order, expressly found that this representation was not in contempt of his Order noting that "a review of the voluminous documents in this case does not disclose that any of the defendants are in contempt of this Court's Order of July 6, 1970." (Appendix II, page 153a.) Surely there is no basis for this Court to set aside Judge Bonsal's decision regarding contempt of his own Order.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that that portion of the judgment of the Court below which held that Mr. Freedman had paid his own legal expenses and that there is no basis for any Order directing Mr. Freedman to reimburse the NMU Officers Pension Fund for legal fees and disbursements attributable to his defense should be affirmed.

Respectfully submitted,

Stanley B. Gruber
Attorney for Defendant-Appellee
Abraham E. Freedman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,	:	
Plaintiffs,	:	AFFIDAVIT
-Against-	:	69 Civ. 442 (LWP)
JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,	:	
Defendants.	:	

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF PHILADELPHIA)

Abraham E. Freedman, being duly sworn, deposes and says:

1. I am one of the named defendants in the within action and am personally familiar with the matters herein stated. I submit this affidavit in opposition to the application of plaintiffs for an order directing the entry of judgment against the National Surety Corporation for the amount of the judgment against me, and in opposition to the motion to hold me in contempt.

2. I wish to advise the Court that on January 16, 1974, immediately following notice to me of denial by the United States Supreme Court of my petition for a writ of certiorari, I delivered to the NMU Officers' Pension Plan a check in the amount of

$288,860.00 in payment of the judgment rendered against me. This check was for the amount of the original payment by the NMU Officers' Pension Plan to William Perry in the amount of $222,200.00 plus interest at the rate of 6% from January 16, 1969 when the payment was made until January 16, 1974, the date of the payment by me. With this payment, I submit that I have fully satisfied the judgment entered by this Court and I request the Court to direct the Clerk to enter the satisfaction of the judgment and to discharge the bond posted by me to secure payment of the judgment. I would also add that this payment was made prior to the motion filed by counsel for plaintiffs and not in response to any action taken by counsel for plaintiffs, but rather on my own initiative immediately following the denial of my petition for a writ of certiorari.

3. Plaintiffs' application to hold me in contempt for the payment of counsel fees to Messrs. Bloom and Epstein is totally and completely without foundation. I have personally paid my own counsel fee to Simon H. Rifkind, Esq. and to Messrs. Bloom and Epstein for the services which they rendered for me and no counsel fees were paid by the NMU Officers' Pension Plan or the National Maritime Union for services rendered on my behalf. The fee paid by the NMU Officers' Pension Plan to the firm of Messrs. Bloom and Epstein were in payment for services rendered by them for the sole benefit of the Plan. In particular, one of the plaintiffs' claims in this litigation was the contention that the sum of $1,108,637.62 paid by the National Maritime Union to the

Officers' Pension Plan to fund pensions for appointed officers was improper and should be returned to the Union. Messrs. Bloom and Epstein were the only counsel to oppose this claim and were successful in this regard. As a result of their services this $1,108,637.62 was saved to the Plan and maintained as part of the Plan. Their services in this regard were of benefit to the Officers' Pension Plan alone, and of no benefit to me. Accordingly, it was proper for them to be compensated for such services by the Officers' Pension Plan. Insofar as Messrs. Bloom and Epstein rendered services on my behalf, I paid them personally for such services in the total amount of $22,687.97. No portion of any counsel fee for services rendered to me personally have been paid for by the NMU Officers' Pension Plan. Accordingly, I respectfully submit that I have complied with this Court's orders in all respects and that the application to hold me in contempt should be denied.

Abraham E. Freedman

Abraham E. Freedman

Sworn to before me this

30th day of January, 1974.

Linda Caspata

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA, Plaintiffs, -against- JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER, Defendants.	AFFIDAVIT 69 Civ. 442 (D.B.B.)

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

MEL BARISIC, being duly sworn, deposes and says:

1. I am the Secretary-Treasurer of the National Maritime Union of America, AFL-CIO. I have been advised that at a conference held in this matter on June 28, 1974, the Court requested an affidavit from an appropriate official of the National Maritime Union with respect to whether certain legal fees paid to the law firm of Paul, Weiss, Rifkind, Wharton & Garrison were paid in connection with any matter involved in this case.

2. The legal fees referred to in the National Office Minutes of January 4, 1974 were not paid in connection with any matter involved in the above-captioned litigation, nor did they include payment of any fees incurred by any of the Trustees of the NMU Officers Pension Plan. Rather, these legal fees were paid for services rendered in litigation pending before the Honorable Robert L. Carter of this Court in which the law firm of

Paul, Weiss, Rifkind, Wharton & Garrison appeared. Said fees had absolutely no connection with the instant case nor were they paid for services rendered either directly, or indirectly in connection with this case.

Mel Barisic
MEL BARISIC

Sworn to before me this
15th day of July, 1974.

Christine Smith

CHRISTINE SMITH
Notary Public, State of New York
No. 03-4502329
Qualified in Bronx County
Cert. filed in New York County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs,

-Against-

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Defendants.

AFFIDAVIT

69 Civ. 442 (LWP)

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Shannon J. Wall, being duly sworn, deposes and says:

1. I am the National President of the National Maritime Union of America and one of the named defendants in the within action. I submit this affidavit in opposition to the application of plaintiffs for an award of additional counsel fees against the National Maritime Union and in opposition to the application to hold me and defendant Joseph Curran in contempt.

APPLICATION FOR ADDITIONAL COUNSEL FEES

2. On November 15, 1972, this Court signed an order awarding counsel fees to Messrs. Duer & Taylor in the amount of $110,000. This amount was directed to be paid by the National Maritime Union out of the $674,222.60 recovered by the Union and was based on the

amount of that recovery. Messrs. Duer and Taylor then appealed this award as being inadequate and also appealed various other orders of this Court which had been adverse to their claims. To counteract that part of their appeal seeking additional counsel fees, the undersigned and defendant Joseph Curran filed a separate appeal contending that the award of counsel fees was excessive.

3. By opinion dated June 18, 1973, the United States Court of Appeals for the Second Circuit affirmed this Court's orders in all respects and dismissed plaintiff's appeal in its entirety. A subsequent petition for a writ of certiorari by plaintiffs was denied.

4. Since plaintiffs' appeal was dismissed in all respects, the alleged services rendered by Messrs. Duer and Taylor in connection with this appeal did not result in any recovery to the National Maritime Union or produce any benefits for it. Moreover, plaintiffs' appeal, particularly the claim for additional counsel fees, was not for the benefit of the National Maritime Union, but rather for the sole purpose of extracting additional monies from the Union for plaintiffs' counsel. I submit that there is no principle of law or equity which would justify awarding counsel fees against the Union for services which were unsuccessful, produced no benefit for the Union, and were brought for the personal benefit of plaintiffs and their counsel. Moreover, not only were these services of plaintiffs' counsel on appeal not beneficial to the Union, but in opposing them, additional counsel fees had to be

incurred to protect the Union's interests, which, I submit, plaintiffs should be required to pay out of the prior award to them.

APPLICATION TO HOLD DEFENDANTS IN CONTEMPT

5. Plaintiffs' claim that I should be held in contempt in connection with the payment of fees to Messrs. Bloom and Epstein by the NMU Officers' Pension Plan is totally and completely without merit. The fees paid by the NMU Officers' Pension Plan to Messrs. Bloom and Epstein were for services rendered to the Plan by them. In particular, a substantial part of the plaintiffs' claim following the remand of the case after the first appeal was their contention that contributions made by the Union to the Officers' Pension Plan on behalf of appointed officers were improper and should be returned. The total amount of contributions involved for appointed officers was $1,108,637.62. Messrs. Bloom and Epstein opposed this claim and, in fact, were the only counsel to oppose it. Their efforts were successful and as a result the $1,108,637.62 was maintained as part of the Plan. Their services in maintaining this portion of the fund were not on behalf of defendant Curran or myself but were for the benefit of the Plan, and accomplished a substantial savings for the Plan. The fee paid to Messrs. Bloom and Epstein by the NMU Officers' Pension Plan was for the services which they rendered in this regard, not in payment for any services rendered to myself or for defendant Curran.

Nor has the National Maritime Union made any payment to Messrs. Bloom and Epstein for services rendered for Mr. Curran or myself. Accordingly, there has been no violation of this Court's order of July 6, 1970 and no basis for any finding of contempt.

Shannon J. Wall

Sworn to before me this
31st day of January 1974.

Christine Smith

CHRISTINE SMITH
Notary Public, State of New York
No. 03-4502329
Qualified in Bronx County
Term Expires March 30, 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

U. S. Court of Appeals

James M. Morrissey et al Pltffs-appelts-Appellees

Index No.

- against -

Martin Segal et al, Deftts-appelts-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ss.:

I, James Steele, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 250 West 146th, Street, New York, New York

That on the 28th day of Mar. 1975 at *

deponent served the annexed Brief for Def. appellee Friedman upon **

the in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me, this 28th day of Mar 19 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410350
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

James Steele

JAMES STEELE

* 74 Trinity Place
** Duer and Taylor
* 1 Battery Park Plaza
** Simpson Thacher & Bartlett
* 500 Fifth Avenue
** Herman E. Cooper
* 450 7th Ave.
** Bronson Greenman Allen & Wayne